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No. 90-1859

In the Supreme Court of the United States

OCTOBER TERM, 1990

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

Tamayo-Reyes' argument rests on two related but separate propositions. First, he argues that the Ninth Circuit correctly recognized "[t]he continuing validity of the *Fay v. Noia* [372 U.S. 391 (1963)] standard." (Br. in Opp. 5). Second, he argues that the question in this case differs from the question in *Wainwright v. Sykes*, 433 U.S. 72 (1977). This reply will address these two arguments first. It then will discuss the reasons Tamayo-Reyes advances against granting certiorari.

As Tamayo-Reyes recognizes, the court of appeals' decision rests on the proposition that *Fay*'s deliberate by-pass standard is still good law. He asserts accordingly that this Court's recent cases "revea[l] the continuing validity of *Fay v. Noia* in some contexts." (Br. in Opp. 6; *see id.* at 5). The difficulty with Tamayo-Reyes' position is that shortly before he filed his brief in opposition, the Court overruled *Fay*. *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4795-4797 (U.S., 1991).[1] *Coleman* expressly deprives *Fay*'s deliberate by-pass standard of any validity it might have retained and negates the premise on which both the court of appeals' decision and Tamayo-Reyes' argument rest.

Tamayo-Reyes argues, however, that the issue presented by this case and *Townsend v. Sain*, 372 U.S. 293 (1963), differs from the issue presented in *Wainwright* and presum-

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[1] Although *Coleman* was decided before Tamayo-Reyes filed his brief in opposition, he presumably was unable to learn what the opinion said until after the brief in opposition had been filed.

ably *Coleman*.[2] It follows, he contends, that even if cause and prejudice applies to the failure to raise an issue in state court, deliberate by-pass should still govern the failure to present material evidence in the state proceeding. The initial problem with this argument is that it is inconsistent with *Townsend*'s reasoning. *Townsend* recognized that the same standard should apply in both situations.

In determining when a federal habeas petitioner should be excused for failing to develop material facts in the state court proceeding, *Townsend* adopted the same standard *Fay* used to determine when a habeas petitioner should be excused for failing to appeal from a state court ruling. 372 U.S., at 317. *Townsend* concluded that *Fay*'s deliberate by-pass standard struck the proper balance between the federal and state interests in both situations. *Ibid*. *Townsend* did not find that the state and federal interests in each situation differed. Rather, it concluded that the identical standard was appropriate in both.

Since *Townsend*, the Court has held that *Fay*'s deliberate by-pass standard gives too little weight to the States' interest in the finality of criminal convictions and in ensuring that state proceedings remain the focus of a criminal defendant's efforts. *Coleman v. Thompson*, *supra*, 59 U.S.L.W., at 4795-4797; *Wainwright v. Sykes*, 433 U.S., at 90. Cause and prejudice instead strikes the proper balance. *Ibid*. If, as *Townsend* recognized, the same standard should apply to the failure to develop material facts in the state court that applies to the failure to raise an issue, then it follows that cause and prejudice applies here with the same force that it applies in *Wainwright* and *Coleman*.

[2] In *Wainwright* and *Coleman*, the federal habeas petitioner failed either to raise a federal issue in state court or to file a timely appeal from the state trial court's resolution of the federal issue he did raise. In this case, the federal habeas petitioner failed to present evidence to the state post-conviction court that he now claims was material to the state court's accurate resolution of the federal issue he raised.

Beyond *Townsend*'s recognition that the standard should be identical, the same concerns that caused the Court to apply a cause and prejudice standard to the failure to raise an issue are equally applicable here. Whether a federal habeas petitioner fails to raise an issue in state court or fails to present the evidence necessary for the state court to resolve the issue he does raise, the effect is the same. The state court is deprived of an effective opportunity to rule on the federal claim in each instance. The State's interest in ensuring a full and accurate resolution of the federal claims a criminal defendant raises is no different from its interest in ensuring that he raise the federal claim in the first place, as the Court's reasoning in *Murray v. Carrier*, 477 U.S. 478, 487 (1986), makes clear.

In considering the costs a procedural default imposes on the States, the *Murray* Court explained:

> Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," [*Engle v. Isaac*, 456 U.S. 107, 128 (1982)], are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives

> state appellate courts no chance to review trial errors, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129.

Murray v. Carrier, *supra*, at 487. The costs to the State are the same here. Failure to present evidence material to the resolution of a criminal defendant's federal claim deprives the state court of an effective opportunity to correct the claimed error, detracts from the importance of the state proceedings, gives state appellate courts no reason to question the trial court's resolution of the defendant's federal claim, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules" that require a litigant to bring forth all relevant evidence at the state hearing.[3]

It would make little sense to hold a criminal defendant responsible for raising all federal issues in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for presenting all evidence material to the resolution of those claims to the state court. If, absent deliberate by-pass, a federal habeas petitioner can avoid the force of the state court fact findings, then the state trial on the merits will be reduced to "a 'tryout on the road' for what will

[3] These interests are expressed at a criminal defendant's trial by the rules limiting both the reasons and the time in which a criminal defendant may ask the court to grant a new trial based on newly discovered evidence. Or. Rev. Stat. § 136.515; Or. R. Civ. P. 64. Similar rules limit a state post-conviction petitioner's ability to submit newly discovered evidence. *See* Or. R. Civ. P. 64. Finally, Oregon statutes limit a convict to only one post-conviction proceeding, thus expressing the state's interest in ensuring that all issues and evidence be presented at one post-conviction hearing. *See* Or. Rev. Stat. § 138.550(3).

later be the determinative federal habeas hearing," contrary to the reasoning in *Wainwright v. Sykes*, 433 U.S., at 90. Similarly, the State's interest in ensuring finality, which the Court found controlling in *Coleman*, would be subverted whenever a federal habeas petitioner can think of a material fact that his counsel negligently (or even purposefully under the Ninth Circuit's decision) forgot to introduce at the state trial.[4] Although the issue presented here is not identical to the issue in *Wainwright*, there is no substantive difference between the two. Tamayo-Reyes errs in arguing that the two should be subject to a different standard.

Tamayo-Reyes' brief in opposition finally suggests a number of reasons why certiorari is not warranted. This reply will address each briefly. First, Tamayo-Reyes argues that there is no conflict in the circuits. The conflict, however, is between the Ninth Circuit's adherence to *Fay*'s deliberate by-pass test and the Court's express rejection of *Fay* in *Wainwright*, *Murray*, and most recently *Coleman* — a conflict commentators have noticed. *See* YACKLE, POSTCONVICTION REMEDIES 435 (1981). Because *Coleman* overrules the premise on which the Ninth Circuit's holding rests, the State respectfully suggests that it would be appropriate to grant certiorari, vacate the judgment, and remand for reconsideration in light of *Coleman*.

[4] Because the Ninth Circuit would excuse every failure to present material evidence except a deliberate decision by the habeas petitioner himself, trial counsel could deliberately choose to withhold evidence at the state hearing without affecting his or her client's right to a federal evidentiary hearing.

Second, Tamayo-Reyes refers to the court of appeals' "thoughtful analysis," its "detailed and cogent analysis," and its "carefu[l] explor[ation of] the law of habeas corpus," presumably to demonstrate that the court of appeals resolved this issue correctly. (Br. in Opp. 2-3). Tamayo-Reyes fails to mention that the court of appeals' opinion passes over, in a footnote, the question presented by the petition for certiorari — whether cause and prejudice or deliberate by-pass is the proper test. *See Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1501 n.19 (9th Cir. 1991). The court of appeals never cites *Wainwright*, *Murray*, or any of the Court's cases that question *Fay*'s continuing validity. However cogent the rest of the Ninth Circuit's analysis may be, the opinion appears to have relegated the difficult issues to cursory treatment in a footnote.

Third, Tamayo-Reyes argues that using a deliberate by-pass standard presents no real problem because "all indications are that [federal] evidentiary hearings are the exception rather than the rule." (Br. in Opp. 7). The difficulty with Tamayo-Reyes' argument is that the treatise he cites contradicts rather than supports his claim. What the treatise says is that federal courts have rarely granted habeas relief without holding an evidentiary hearing. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 20.1, at 261 (1988). It does not say that federal evidentiary hearings are the exception, as Tamayo-Reyes states. And the treatise urges habeas petitioners to seek federal evidentiary hearings in every case, except for the "rare circumstances when the state

court record and findings require relief as a matter of law." *Id.*, at 263.[5]

Far from suggesting that few evidentiary hearings are or should be held, the treatise on which Tamayo-Reyes relies would convert every petition for federal habeas into a new evidentiary hearing. Nor can Tamayo-Reyes argue that the Ninth Circuit's rule, if applied literally, would not allow virtually every habeas petitioner to have a federal court redecide the facts the habeas petitioner already had a full and fair opportunity to litigate in state court. There will be few cases in which a federal habeas petitioner cannot think of how his state counsel could have tried his case better.

Fourth, Tamayo-Reyes argues that the State has "misconstrued the nature of the writ of habeas corpus. Habeas proceedings are not appeals." (Br. in Opp. 7). While the second sentence is true, the Court has recognized that questions of comity and federalism require federal courts to defer to state court fact findings where appropriate, and the question is when federal courts should defer. All the State's argument would do would be to provide symmetrical treatment to a habeas petitioner's failure to raise an issue and his failure to make a complete record on the issues he did raise.

Fifth, Tamayo-Reyes argues that applying a cause and prejudice standard would read "subsection (3) out of 28 U.S.C. 2254(d) and eliminate the fifth of the *Townsend* situations in which a federal hearing is required." Tamayo-Reyes overstates his case. *Townsend v. Sain*, 372 U.S. 293, 317 (1963), recognized that it would subvert federal-state

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[5]Liebman's treatise is written from an adversarial perspective.

relations if every failure to develop a material fact in the state proceedings entitled a habeas petitioner to a federal evidentiary hearing. *Townsend* concluded that *Fay*'s deliberate by-pass standard struck the proper balance. Subsequent cases have recognized that cause and prejudice better serves the interest *Townsend* sought to protect. Recognizing a cause and prejudice standard here would not eliminate the fifth *Townsend* situation, as Tamayo-Reyes argues. Rather, it would simply adjust the balance *Townsend* sought to preserve and bring it in line with the Court's more recent decisions.

Sixth, Tamayo-Reyes' brief in opposition recasts the facts in such a way to suggest that it would be unjust to deny him a new evidentiary hearing. Holding that cause and prejudice is the proper standard, however, would not necessarily mean that Tamayo-Reyes would not receive a hearing. Rather, it would only mean that the district court could test his claim on remand under the proper standard. Moreover, the facts stated in the brief in opposition are not always completely accurate.

To be sure, the facts are not material when, as in this case, the question is what the correct legal rule is, but it never hurts to get the facts right. Tamayo-Reyes' brief says, for example, that during the plea hearing in state court, Tamayo-Reyes stated he did not understand, conferred off the record, and later responded, "Okay" through the interpreter. (Br. in Opp. 2). The brief fails to mention that after Tamayo-Reyes responded "Okay," the state trial court took pains to clarify his response. It asked whether he now understood the choice between going to trial and pleading, to which Tamayo-Reyes replied yes. It asked whether he choose to be convicted of manslaughter without a jury trial, to which Tamayo-Reyes

replied yes. And it asked him whether he knew that his plea could lead to his being deported, to which Tamayo-Reyes replied yes. Tamayo-Reyes' brief never mentions that the state trial court accepted his plea only after confirming that Tamayo-Reyes did in fact understand what he was doing.

The point is not to suggest that the question presented by the State's petition turns on the particular facts of this case. The petition does not question the application of a settled principle to specific facts. Rather, it questions whether the Ninth Circuit has announced the right principle. This reply notes one of the apparent misstatements in the brief in opposition only to suggest that the brief's factual assertions are not always completely trustworthy.

CONCLUSION

For the reasons stated above and in the petition for certiorari, certiorari should be granted and the judgment reversed.

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